Malayan Banking Bhd v Premier Expand Sdn Bhd & Ors (the owners of and/or any other persons interested in the ship or vessels the 'Zuhairi' and 'Nasuha')

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D-27–30 OF 2011
NALLINI PATHMANATHAN J
24 OCTOBER 2012

Banking — Securities for advances — Mortgage — Mortgage of vessels — Equitable mortgage — Loan facility to finance purchase of vessels — Vessels mortgaged as security — Failure to register mortgage — Vessels sold and transferred to third party — Statutory mortgage registered by third party — Foreclosure proceedings — Whether equitable mortgage arose — Whether sale and transfer of vessels to third party rendered equitable mortgage void — Defence of bona fide purchaser without notice — Whether registered mortgage has priority over prior equitable mortgage

Civil Procedure — Injunctions — Prohibitory injunction — Breach — Injunction prohibiting dealings in vessels — Vessels subsequently sold and transferred to third party — Third party unaware of injunction — Whether amounting to contempt — Whether sale void

Contract — Frustration — Sale and purchase of property — Contract for sale of vessels — Whether contract for sale and transfer of vessels to third party frustrated by existence of prior equitable mortgage over vessels — Void — Alleged frustrating act arising prior to sale transaction — Whether contract frustrated

Equity — Equitable mortgage — Loan facility to finance purchase of vessels — Vessels mortgaged as security — Failure to register mortgage — Vessels sold and transferred to third party — Statutory mortgage registered by third party — Whether equitable mortgage arose — Whether sale and transfer of vessels to third party rendered equitable mortgage void — Defence of bona fide purchaser without notice — Whether registered mortgage has priority over prior equitable mortgage

The plaintiff granted a loan facility amounting to RM4,000,000 to part finance the purchase of two vessels known as 'Zuhairi' and 'Nasuha' by the second defendant upon the request of the first defendant. The borrower was therefore the first defendant. As security for the loan, the two vessels were to be mortgaged by way of a third party mortgage charged to the plaintiff, joint and

A several guarantees were given by the directors of the first defendant, namely Samsulameri bin Mohamad, Mohd Azam bin Zainuddin and the directors of the second defendant, namely Mohd Zin bin Omar. The first defendant defaulted in payment and the plaintiff initiated foreclosure proceedings on the vessels. Only at this stage did the plaintiff realise that no mortgage over the said B vessels had ever been registered in their favour. Further, it was discovered that the second defendant had transferred and registered the vessels in favour of the third defendant in November 2000. The plaintiff filed this action in September 2004 and obtained an order to arrest the said vessels. After the arrest, the fifth C defendant intervened on the grounds that the vessels had been transferred to the fifth defendant by the third defendant in October 2004. In June 2005, an injunction to prohibit dealings with the said vessels was recorded at the High Court by consent between the plaintiff and the fifth defendant. However, despite the injunction, the fifth defendant subsequently sold and transferred D the said vessels to the sixth defendant in August 2005 for 'Zuhairi' and February 2007 for 'Nasuha'. The plaintiff contended that this sale and transfer was in contravention of the injunction and without the consent or knowledge of the plaintiff. The bills of sale from the fifth defendant to the sixth defendant were registered at the Pejabat Pendaftaran Kapal-Kapal Malaysia Pelabuhan E Klang. The sixth defendant then executed a mortgage over the said vessels in favour of the seventh defendant for a loan facility to finance the purchase of the said vessels from the fifth defendant. The seventh defendant registered their interest in the vessels with the Port Klang Marine Registry. The plaintiff thus F sought for declarations that: (a) the transfers of the vessels from the second defendant to the third defendant, from the third defendant to the fifth defendant and from the fifth defendant to the sixth defendant were null and void; and (b) the statutory mortgage for the vessels were null and void. The plaintiff contended that the transfer of the vessels from the fifth defendant to G the sixth defendant was made against the injunction order and thus the breach of the court order rendered the whole transaction between the fifth defendant and sixth defendant void on the grounds that the contract between the fifth defendant and sixth defendant was frustrated. The issues which arose for determination were: (i) was there an equitable mortgage in favour of the H plaintiff; (ii) if an equitable mortgage subsisted in favour of the plaintiff, what was the effect of the transfer of the vessels; (iii) were the transfers effected to avoid the registration of the equitable mortgage; (iv) what was the effect of a transaction effected in breach of a court order; (v) whether a registered mortgage has priority over a prior equitable mortgage?

I

Held, dismissing the plaintiff's claims:

(1) Based on the facts of the case, notwithstanding the failure to register, the plaintiff had an equitable mortgage vested over the vessels as a form of

security which was created by the granting of the loan facility to the first defendant as borrower, to part finance the purchase of the two vessels (see para 43).

(2) With regards to the first transfer between the second defendant and the third defendant, the directors of the third defendant were the children of a director in the second defendant. The companies had very close ties. The business address of the third defendant was the same as the address of the first defendant and the second defendant. Thus, the defence that the third defendant was a bona fide purchaser without notice could not stand as it was quite unlikely that the third defendant did not know that the ownership of the two vessels were in the names of the second defendant but subjected to the equitable mortgage of the plaintiff (see paras 57–61).

(3) There was clear evidence of a manipulation executed by the second defendant in transferring the vessels from the second defendant to the third defendant, and again by the third defendant to the fifth defendant (see para 61).

(4) The plaintiff's contention that the transfer from the fifth defendant to the sixth defendant was defeated by the doctrine of frustration was untenable. The act on which the plaintiff relied to claim frustration, was in fact an event which arose prior to the sale transaction between the fifth defendant and the sixth defendant. While such a sale might give rise to consequences such as contempt vis a vis the fifth defendant, it was not possible to conclude that the transaction between the fifth defendant and the sixth defendant was rendered null and void given that the sixth defendant was at all material times a bona fide purchaser for value without notice of the existence of the injunction (see para 72).

(5) It was unreasonable to burden the sixth and seventh defendant to foresee any injunction or equitable mortgages. As far as they were concerned, they carried out the requisite searches at the registry and found no encumbrances. It would also be unfair to rob the sixth and seventh defendant of their rightful ownership of the vessels when the sixth defendant had lawfully entered into the sale and purchase agreement with the fifth defendant entirely unaware of the injunction (see para 74).

(6) The seventh defendant who had the statutory mortgage over the vessels had priority of claim over that of the plaintiff who only acquired an equitable mortgage (see para 83).

[Bahasa Malaysia summary

Plaintif diberikan kemudahan pinjaman berjumlah RM4,000,000 untuk membiayai sebahagian pembelian dua buah kapal yang dikenali sebagai 'Zuhairi' dan 'Nasuha' oleh defendan kedua atas permintaan defendan pertama. Oleh itu peminjam merupakan defendan pertama. Sebagai cagaran

untuk pinjaman, dua buah kapal tersebut akan digadai janji melalui gadai janji pihak ketiga dan digadaikan kepada plaintif, jaminan bersama dan berasingan telah diberikan oleh pengarah-pengarah defendan pertama iaitu; Samsulameri bin Mohamad, Mohd Azam bin Zainuddin dan pengarah defendan kedua iaitu; Mohd Zin Bin Omar. Defendan pertama mungkir membuat bayaran dan plaintif memulakan prosiding perampasan ke atas kapal-kapal tersebut. Hanya pada peringkat ini barulah plaintif menyedari bahawa tiada gadai janji terhadap kapal-kapal tersebut pernah didaftarkan bagi pihak mereka. Seterusnya, didapati bahawa defendan kedua telah memindahkan dan mendaftarkan kapal-kapal bagi pihak defendan ketiga pada November 2000. Plaintif memfailkan tindakan ini pada September 2004 dan mendapatkan satu perintah untuk menarik kapal-kapal tersebut. Selepas penarikan, defendan kelima mencelah atas alasan bahawa kapal-kapal tersebut telah dipindahkan kepada defendan kelima melalui defendan ketiga pada Oktober 2004. Pada Jun 2005, satu injunksi untuk menghalang urusan-urusan dengan kapal-kapal tersebut direkodkan di Mahkamah Tinggi dengan persetujuan antara plaintif dan defendan kelima. Walau bagaimanapun, meskipun terdapat injunksi, defendan kelima kemudiannya menjual dan memindahkan kapal-kapal kepada defendan keenam pada Ogos 2005 untuk 'Zuhairi' dan Februari 2007 untuk 'Nasuha'. Plaintif menghujah bahawa jualan dan pindahan bercanggah dengan injunksi dan tanpa persetujuan atau pengetahuan plaintif. Bil-bil jualan daripada defendan kelima kepada defendan keenam didaftarkan di Pejabat Pendaftaran Kapal-Kapal Malaysia Pelabuhan Klang. Defendan keenam kemudiannya menyempurnakan satu gadai janji ke atas kapal-kapal tersebut bagi pihak defendan ketujuh untuk satu kemudahan pinjaman untuk membiayai pembelian kapal-kapal tersebut daripada defendan kelima. Defendan ketujuh mendaftarkan kepentingan mereka dalam kapal-kapal tersebut dengan Pejabat Pendaftaran Marin Pelabuhan Klang. Plaintif oleh itu memohon untuk deklarasi-deklarasi bahawa: (a) pindahan kapal-kapal daripada defendan kedua kepada defendan ketiga, daripada defendan ketiga kepada defendan kelima dan daripada defendan kelima kepada defendan keenam adalah batal dan tak sah; dan (b) gadai janji statutori untuk kapal-kapal tersebut adalah batal dan tak sah. Plaintif menghujah bahawa pindahan kapal-kapal daripada defendan kelima kepada defendan keenam dibuat bercanggah dengan perintah injunksi dan oleh itu melanggar perintah mahkamah, mengakibatkan keseluruhan transaksi antara defendan kelima dan keenam terbatal atas alasan bahawa perjanjian antara defendan kelima dan keenam telah dikecewakan. Isu-isu yang timbul untuk ditentukan ialah: (i) adakah terdapat gadai janji ekuiti bagi pihak plaintif; (ii) sekiranya satu gadai janji ekuiti wujud bagi pihak plaintif, apakah akibat pindahan kapal-kapal tersebut; (iii) adakah pindahan dilakukan untuk mengelakkan pendaftaran gadai janji ekuiti; (iv) apakah kesan transaksi yang mengakibatkan pelanggaran perintah mahkamah; (v) sama ada gadai janji berdaftar mempunyai keutamaan melebihi gadai janji ekuiti sebelumnya?

Diputuskan, menolak tuntutan plaintif:

(1) Berdasarkan fakta-fakta kes, walaupun gagal untuk mendaftar, plaintif

mempunyai gadai janji ekuiti terhadap kapal-kapal dalam satu bentuk cagaran yang dihasilkan dengan memberikan kemudahan pinjaman kepada defendan pertama sebagai peminjam, untuk membiayai sebahagian belian kedua-dua kapal tersebut (lihat perenggan 43).

(2) Mengenai pindahan pertama antara defendan kedua dan ketiga, pengarah-pengarah defendan ketiga merupakan anak-anak kepada seorang pengarah dalam defendan kedua. Syarikat-syarikat mempunyai hubungan yang rapat. Alamat perniagaan defendan ketiga sama dengan alamat defendan pertama dan kedua. Oleh itu, pembelaan bahawa defendan ketiga merupakan pembeli bona fide tanpa notis tidak boleh ditegakkan memandangkan adalah mustahil bahawa defendan ketiga tidak mengetahui bahawa milikan kedua-dua kapal berada di atas nama defendan kedua tetapi tertakluk kepada gadai janji ekuiti plaintif (lihat perenggan 57 & 61).

(3) Terdapat keterangan jelas mengenai manipulasi yang dilakukan oleh defendan kedua ketika memindahkan kapal-kapal daripada defendan kedua kepada defendan ketiga dan daripada defendan ketiga kepada defendan kelima (lihat perenggan 61).

(4) Hujah plaintif ialah pindahan daripada defendan kelima kepada defendan keenam telah dikecewakan melalui doktrin kekecewaan adalah tidak berasas. Tindakan yang menjadi asas oleh plaintif untuk mendakwa kekecewaan sebenarnya adalah peristiwa yang timbul sebelum transaksi jualan antara defendan kelima dan keenam. Walaupun jualan tersebut mungkin menimbulkan kesan seperti penghinaan kepada defendan kelima, adalah tidak mustahil untuk menyimpulkan bahawa transaksi antara defendan kelima dan keenam menyebabkannya batal dan tak sah memandangkan defendan keenam pada semua masa material merupakan pembeli bona fide untuk nilai tanpa mengetahui kewujudan injunksi (lihat perenggan 72).

(5) Adalah tidak munasabah untuk membebankan defendan keenam dan ketujuh untuk meramalkan sebarang injunksi atau gadai janji ekuiti. Setakat yang diketahui mereka, mereka telah menjalankan carian yang diperlukan pada pendaftaran dan mendapati tiada bebanan-bebanan. Adalah tidak adil untuk merampas milikan sah kapal-kapal daripada defendan keenam dan ketujuh apabila defendan keenam telah memeterai perjanjian jual dan beli yang sah dengan defendan kelima dengan tidak menyedari mengenai injunksi (lihat perenggan 74).

(6) Defendan ketujuh yang mempunyai gadai janji statutori terhadap kapal-kapal tersebut mempunyai keutamaan tuntutan melebihi plaintif yang hanya memperolehi satu gadai janji ekuiti (lihat perenggan 83).]

Notes

For a case on mortgage, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2818.

For a case on prohibitory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4147.

For cases on sale and puchase of property, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4526–4527.

Cases referred to

Advertising Department Pty Ltd v The Ship MV Port Philip [2004] FCA 1762 (refd)

Barclay & Co Ltd v Poole [1907] 2 Ch 284, Ch D (folld)

Black v Williams [1895] 1 Ch 408, Ch D (folld)

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 41 ALR 367, HC (refd)

Davis Contractors Ltd v Fareham Urban District Council [1956] 2 All ER 145, HL (refd)

Enfield, The; Barbury (Panama) SA & Anor v CrossOceanic Navigational Services Pte Ltd [1982] 2 MLJ 106, CA (refd)

Horlock, The (1877) 2 PD 243 (refd)

Jarguh Sawit, The; Navigation Maritime Bulgare v Owners of the Ship or Vessel 'Jarguh Sawit' [1995] 3 SLR 840, HC (distd)

London County and Westminster Bank, Ltd v Tompkins [1918] 1 KB 515, CA (refd)

Pilcher v Rawlins (1872) 7 Ch App 259 (refd)

HEH The Nizam's Jewellery Trust, Re AIR 1980 SC 17, SC (refd)

Shigenori Ono v Thong Foo Ching & Ors [1992] 1 MLJ 117, HC (refd)

Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd [1991] 2 MLJ 251, HC (refd)

Shizelle, The [1992] 2 Lloyd's Rep 444 (refd)

Legislation referred to

Contracts Act 1950 s 57
Merchant Shipping Act 1854 [UK]
Merchant Shipping Ordinance 1952 ss 41, 43
Rules of the High Court 1980 O 12 r 1(2)

Vignesh Kumar (Syazlinda Nadia with him) (Balendran Chong) for the plaintiff.
(Teh & Associates) for the first, second and fourth defendants.
R Sarengapani (RS Pani & Associates) for the third defendant.
Rasheed (Chor Pee Anwarul & Co) for the sixth defendant.
Mohd Iskandar (Wan Anwar Numiri & Associates) for the seventh defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff in this case (Malayan Banking Bhd) has filed an action against the defendants seeking declarations that:

(a) the transfer of ownership of the vessels known as 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 from Jelai Holdings Sdn Bhd ('the second defendant') to Capital Surge Sdn Bhd ('the third defendant') is null and void;

(b) bill of sale dated 23 October 2000 is null and void;

(c) the transfer of ownership of vessels known as 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 from Capital Surge Sdn Bhd (the third defendant) to Optimum Aim Sdn Bhd ('the fifth defendant') is null and void;

(d) bill of sale dated 9 September 2004 under the Serial No 00140 and 00009 is null and void;

(e) the ownership of vessels known as 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 by Jelai Marine and Travel Sdn Bhd ('the fourth defendant') if it is true, is null and void;

(f) the transfer of ownership of vessels known as 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 from Optimum Aim Sdn Bhd (the fifth defendant) to Citra Line Sdn Bhd ('the sixth defendant') is null and void;

(g) bill of sale dated 15 August 2005 and 8 February 2007 is null and void;

(h) the statutory mortgage for the vessel known as 'Zuhairi' registered at the Registrar of Malaysian Ship on 13 April 2006 is null and void;

(i) the statutory mortgage for the vessel known as 'Nasuha' registered at the Registrar of Malaysian Ship on 17 December 2007 is null and void;

(j) the plaintiff holds an equitable mortgage of the said vessels 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413;

(k) an order for sale for the said vessels 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 be granted to satisfy the amount due and owing for the sum of

A RM7,474,042.05 as at 31 March 2003 together with the continuing interest at the rate of 9.45% calculated on monthly basis from 1 April 2003 until full and final settlement and/or full payment;

(l) the said vessels 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 be auctioned off separately, if necessary;

(m) the relevant bodies and/or the relevant government agencies are ordered to register the purchaser and/or purchasers of the said vessels 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 as the registered legal owner;

(n) damages to be assessed and paid by the defendants;

(o) should the transfer of ownership of the said vessels 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413 under the name of the sixth defendant and the registration of the mortgage deed by the seventh defendant be valid, the damages and indemnity is paid by the fifth defendant to the plaintiff; and

(p) cost of the action.

BACKGROUND FACTS

[2] The brief background facts leading up to the present claim have been comprehensively set out in the plaintiff's summary of facts in their submission, which I have adopted here. The plaintiff granted a loan facility amounting to RM4,000,000 ('the said loan') to part finance the purchase of two vessels known as 'The Whitsunday Experience' and 'Spirit of Lindeman' by Jelai Holding Sdn Bhd (the second defendant) upon the request of Premier Expand Sdn Bhd (the first defendant). The borrower was therefore the first defendant. The two vessels' names were subsequently changed to 'Zuhairi' and 'Nasuha' respectively. As security for the loan, the two vessels were to be mortgaged by way of a third party mortgage charged to the plaintiff, along with some properties belonging to the second defendant, and joint and several guarantees given by the directors of the first defendant, namely Samsulameri bin Mohamad, Mohd Azam bin Zainuddin and the directors of the second defendant, namely Mohd Zin bin Omar.

[3] The transaction came about when the second defendant entered into a business deal with International Broking Service ('IBS'), an Australian company, for the purpose of purchasing the said vessels for the amount of Australian Dollars 3,200,000. The second defendant was at the material time,

the plaintiff's regular customer where they had several loan accounts with the plaintiff and loan facilities granted by the plaintiff.

[4] At the material time, the second defendant did not qualify to apply for a loan to purchase the said vessels and thus, the application for a loan was made under the first defendant as the borrower. However, the said vessels were to be purchased by the second defendant. The said loan application was approved by the plaintiff with a few conditions, one of which, was that as security for the loan, a statutory mortgage over the two units of the vessels were to be created for the benefit of the plaintiff together with some landed property belonging to the second defendant, as well as joint and several guarantees of the directors of the second defendant company as well as Mr Mohd Zin bin Omar who is a director of both the first and second defendant companies. The position was to be that the vessels were to be registered in the name of the second defendant, but a mortgage would be made in favour of the plaintiff.

[5] Simultaneously, an insurance policy for the said vessels were issued under the name of the plaintiff as the beneficiary under the policy by Talasco Insurance Sdn Bhd for the periods of 26 June 1997–21 July 1997 and extended from 7 July 1997–6 July 1998.

[6] The vessels reached Malaysia in 1997 and were registered to the second defendant by the Registry of Malaysian Ships at Port Klang on 14 September 2000, 'Zuhairi' under the registered Serial No 328412 and 'Nasuha' under the registered Serial No 328413.

[7] When the first defendant defaulted in payment, plaintiff wrote two letters of demand dated 31 July 1998 and 11 November 1998 demanding the repayment of the loan facility from the first defendant, and subsequently took steps to initiate foreclosure proceedings on the vessels in 2004. Only at this stage did the plaintiff realise that no mortgage over the said vessels had ever been registered in their favour.

[8] Further, it was later discovered that the second defendant had transferred and registered the vessels in favour of the third defendant on/or about 27 November 2000, pursuant to a bill of sale.

[9] On 27 March 2003, there was a press statement in *Utusan Malaysia* where Jelai Marine and Travel Sdn Bhd (the fourth defendant) claimed that the said vessels were owned by them.

[10] The plaintiff proceeded to file this action at the High Court of Kuantan on 30 September 2004, and subsequently proceeded to obtain an order to arrest the said vessels. After the arrest by the port authority, the fifth defendant

A applied to intervene and to set aside the said order for arrest on the grounds that the vessels had been transferred to the fifth defendant (Optimum Aim Sdn Bhd) by the third defendant on 12 October 2004.

B **[11]** On 20 June 2005, an injunction to prohibit dealings with the said vessels was recorded at the High Court of Kuantan by consent between the plaintiff and the fifth defendant.

[12] However, despite the injunction, the fifth defendant subsequently sold
C and transferred the said vessels to the sixth defendant pursuant to a bill of sale dated 15 August 2005 for 'Zuhairi' and 8 February 2007 for 'Nasuha'. The plaintiff contends that this sale and transfer was in contravention of the injunction and without the consent and/or knowledge and/or approval of the plaintiff. The sale and transfer only came to light when the action was
D scheduled for trial on 18 October 2010–22 October 2010 at the High Court in Kuantan.

[13] Both the bills of sale dated 15 August 2005 for 'Zuhairi' and 8 February
E 2007 for 'Nasuha' were registered at the Pejabat Pendaftaran Kapal-Kapal Malaysia Pelabuhan Klang pursuant to Certificate of Malaysia Registry No 328412 and Certificate of Malaysia Registry No 328413 respectively in favour of the sixth defendant. The sixth defendant also executed a mortgage over the said vessels in favour of the seventh defendant vide a mortgage which was
F recorded on 13 April 2006 and 17 February 2007. The sixth defendant had obtained a loan facility from the seventh defendant to finance the purchase of the said vessels from the fifth defendant.

[14] The plaintiff has also recorded judgment against the guarantors namely
G Mohd Azam bin Zainuddin and Mohd Zin bin Omar vide Civil Suit No 22–22 of 2001. A consent judgment was also recorded against Mohd Zin bin Omar on 15 August 2006.

H **[15]** The first defendant has been wound up and the first defendant via the official assignee conceded at trial that it will not contest the matter and that it is agreeable to the reliefs sought by the plaintiff.

[16] The second and fourth defendants are not contesting the claim or filing
I any defence.

[17] The fifth defendant has no solicitors on record to defend them, and since they are a corporation, pursuant to O 12 r 1(2) of the Rules of the High Court 1980, a corporation must be represented by a solicitor.

[18] With regards to the sixth and seventh defendants, they both claim that they have priority over the plaintiff's claim, as their respective interest have been registered as opposed to the plaintiff's interest which was never registered.

[19] The plaintiff contends that the transactions are in breach of the injunction dated 20 June 2005 and therefore are void. Therefore, the registration of the transfers and mortgage in favour of the sixth and seventh defendants has no priority even if they were bona fide transactions.

THE TRIAL

[20] The trial of this matter took place over two days. Only the plaintiff, the third, sixth and seventh defendants were involved in the trial. The plaintiff called four witnesses, namely Hayati Idayu bt Mohd Yusoff, an officer in the plaintiff's company ('PW1'), Samsulameri bin Mohamad, a director in the first defendant company ('PW2'), Mohd Azam bin Zainuddin a director in the first defendant company ('PW3') and Roslee bin Mat Yusof, the Registrar of Malaysian Ship ('PW4'). The third defendant called Mohd Zin bin Omar, a director in the second defendant company ('DW1'). The sixth defendant called Azahari bin Mohd Amin, a director in the sixth defendant company ('DW2'), and the seventh defendant called Azahari bin Seman a director in the seventh defendant company ('DW3').

[21] The first, second, fourth and fifth defendants did not participate in the trial. The fifth defendant did through its director, one Encik Jaffar seek to procure an adjournment of the trial on the grounds that it wished to be heard and needed to procure solicitors on its behalf. The request for an adjournment was denied in view of the age of this claim. However, the fifth defendant was accorded the opportunity of putting in written submissions, which it opted not to do.

THE PARTIES IN THE TRIAL AND THEIR CONTENTIONS

The plaintiff

[22] The plaintiff claims that they have an equitable mortgage over the two said vessels 'Zuhairi' and 'Nasuha' arising from the loan they had granted to the first defendant.

[23] The plaintiff claims that the transfer of ownership from the second defendant to the third defendant was void, as well as the transfer of ownership from the third defendant to the fifth defendant.

[24] The plaintiff then claims that the fifth defendant, who had in fact an injunction order made against them, was in contempt of the court order when they subsequently transferred ownership of the vessels to the sixth defendant.

[25] The plaintiff claims that although the sixth defendant (financed by the seventh defendant) were bona fide purchasers for value without notice, and had their rights registered, the transfer of ownership from the fifth defendant to the sixth defendant was void as it was in breach of the injunction.

[26] These various claims will be discussed in detail further below.

The third defendant

[27] The third defendant contends that the plaintiff did not respond to the second defendant's request that the plaintiff choose either the vessels or the landed properties as security for the said loan facility.

[28] A study of the letter of offer from the plaintiff to the first defendant dated 5 July 1997, clearly shows that as security for the loan, the two vessels were to be mortgaged by way of a third party mortgage charged to the plaintiff, along with some properties belonging to the second defendant, and joint and several guarantees given by the directors of the first defendant. This was also shown in the loan agreement dated 24 November 1997 between the first defendant and the plaintiff. It was never stated in the letter of offer or the loan agreement that the vessels or the lands were to be alternative securities. The third defendant's contention of alternative securities therefore appears untenable.

[29] The third defendant also argues the issue of plaintiff's own negligence in not registering the said mortgage.

[30] The third defendant contends that both the vessels were registered in the name of the second defendant and was rightfully transferred into the name of the third defendant on 27 November 2000, as there were no encumbrances on the vessels.

[31] If the plaintiff had registered their interests in the vessels via a mortgage, it would have given notice to any other party who would have sought to register subsequent mortgages, or at least gave notice to any party who wanted to purchase the vessels. The benefit of the plaintiff registering the mortgage was that not only would they give notice to the world, but they would have priority over any party claiming an interest in the vessel, thus protecting their rights as a mortgagee against any other creditors of the mortgagor.

[32] The third defendant's stand is that there is no equitable mortgage in place at all, and that the plaintiff has no rights over the vessels, and that their remedy would be to chase after the loan monies from the first defendant. This argument will be discussed further below.

The sixth and seventh defendants

[33] The sixth defendant purchased the vessels pursuant to a bills of sale dated 15 August 2005 for 'Zuhairi' and 8 February 2007 for 'Nasuha' from the fifth defendant.

[34] The sixth defendant submits that they are bona fide purchasers for value of the vessels and they had no notice of any injunction order, nor notice of any equitable mortgage of the plaintiff, as no mortgage was ever registered on the vessels. They sixth defendant had paid the consideration in full to the fifth defendant, financed by a loan from the seventh defendant.

[35] The seventh defendant was the finance company which financed the loan for the sixth defendant to purchase the vessels 'Zuhairi' and 'Nasuha'. The seventh defendant granted one facility under *al-Bai Bithaman Ajil* ('BBA') to the sixth defendant to finance the purchase of 'Nasuha' for a loan of RM3,280,000 on 29 March 2007, and on 25 October 2007, the seventh defendant granted one facility under BBA to the sixth defendant to finance the purchase of 'Zuhairi' for a loan of RM1,740,000.

[36] The seventh defendant registered their interest in the vessels with the Port Klang Marine Registry, on 17 April 2007 for 'Nasuha' and 29 November 2007 for 'Zuhairi'.

[37] No caveat or charge was ever entered by the plaintiff on the said vessels, and at the time the statutory mortgages were entered in the name of the seventh defendant, the vessels were free from encumbrances. The seventh defendant therefore contends that they have the rightful statutory mortgage over the two vessels and thus has a right of priority over all unregistered mortgagees, as well as priority in order of the date on which the mortgage is registered.

[38] However, the plaintiff argues that since the transfer of the vessels into the name of the sixth defendant and the registration of the mortgage in favour of the seventh defendant was under an unlawful instrument, therefore the transfer is also unlawful and void, and thus the plaintiff would have priority over the sixth and seventh defendant. This will be discussed in detail further below.

THE ISSUES

(a) Was there an equitable mortgage?

A (b) if an equitable mortgage subsists in favour of the plaintiff, what is the effect of the transfer of the vessels in breach of the contractual obligations?

(c) were the transfers effected to avoid the registration of the equitable
B mortgage?

(d) what is the effect of a transaction effected in breach of a court order? and

(e) whether a registered mortgage has priority over a prior equitable mortgage?

C

Was there an equitable mortgage?

D **[39]** The plaintiff had granted the loan facility to the first defendant as borrower, to part finance the purchase of the two vessels. However, the said vessels were to be purchased by the second defendant. The vessels were to be registered in the name of the second defendant, but a mortgage would be made in favour of the plaintiff. However, no mortgage was ever made in favour of the
E plaintiff and the plaintiff only found this out in 1998 when the first defendant defaulted in payments. The plaintiff contends that the equitable rights of the plaintiff on the said vessels accrued at the time the loan facility was released on or about 31 July 1997, by the plaintiff to International Broking Services pursuant to a letter of credit dated 26 June 1997.

F

[40] The definition of mortgage and equitable mortgage can be found in the case of *London County and Westminster Bank, Ltd v Tompkins* [1918] 1 KB 515, wherein Lord Scrutton LJ held that:

G

> Mortgages are a form of security created by contract conferring an interest in property, defeasible on performing the condition of paying a given sum of money. They may be (a) legal, where the legal ownership of the property is transferred to the mortgagee; or (b) equitable, where the legal ownership remains vested in the owner or some other person, eg, a trustee or first mortgagee, and the security can
H consequently only be enforced under the equitable jurisdiction of the court, which carries it into effect either by giving the creditor immediately the appropriate remedies, or by compelling the debtor to execute a security in accordance with the contract.

I **[41]** Does the fact that no statutory mortgage was in fact registered thus defeat the rights of the plaintiff or does this create an equitable mortgage in favour of the plaintiff footing on the fact that there was a loan facility granted by the plaintiff to the first defendant and with the conditions that the mortgage be registered in favour of the plaintiff?

[42] In essence, the plaintiff should have registered a mortgage under its name. There is no reason for not doing so except for negligence on the part of the plaintiff themselves. However, since the plaintiff did not in fact register their mortgage, it does not mean that they completely lost their rights over the said vessels.

[43] The law is such that it accords fairness and justice to parties. Thus, the doctrine of equity comes to play here, and presents the plaintiff with a solution in the form of an equitable mortgage over the vessels. It is clear that based on the facts of the case, notwithstanding the failure to register, the plaintiff has an equitable mortgage vested over the vessels as a form of security which was created by the granting of the loan facility to the first defendant as borrower, to part finance the purchase of the two vessels.

If an equitable mortgage subsists in favour of the plaintiff, what is the effect of the transfer of the vessels in breach of the contractual obligations?

[44] The vessels were registered under the name of the second defendant at the Registry of Malaysian Ships Port Klang on 14 September 2000. No mortgage was registered in the name of the plaintiff as per the terms in the letter of offer and the loan agreement. I have concluded that notwithstanding the failure to register, an equitable mortgage subsisted in favour of the plaintiff for the reasons stated above. The first transfer was from the second defendant to the third defendant on/or about 27 November 2000.

[45] Is this first transfer between the second defendant and the third defendant valid? The second defendant raises no defence at all in this trial and in fact the directors of the second defendant do not contest the claim. The third defendant ('Capital Surge') however argues that since the vessels were registered in the name of the second defendant, thus there was no prohibition against the second defendant transferring both vessels to any third party, and in this case, the third defendant. The third defendant argues that they acquired good title of the vessel and have no knowledge of any loan transaction between the plaintiff and the first and second defendant. The third defendant states that the transfer from the second defendant to the third defendant was affected to enable the vessels to sail under the Malaysia flag, as the third defendant has the operating license to do so. Thus, the third defendant argues that both vessels were operated by the third defendant for four years, from the years 2000–2004, without any objections from the plaintiff, thus plaintiff who took no positive step at all to register their interest, have indirectly relinquish their claim over the vessels.

[46] There was also in the midst of all this, a press released in the *Utusan Malaysia* that the fourth defendant was the owner of the said vessels (p 230 of

A the common bundle of documents 1, however, no proof was ever adduced apart from this newspaper cutting to show that the fourth defendant was ever the owner of the said vessels, nor was this ownership or transfer ever reflected in the register. An official search with the Companies Commission of Malaysia also reveals that the registered address of the fourth defendant is the same as the B address of the first defendant, the second defendant and the third defendant. The directors of the fourth defendant namely, Zuraini and Mohd Zefri are the children of Encik Mohd Zin (a director in the second defendant), and both directors are also directors of the third defendant company. However, there was no proof that such ownership from the third defendant was ever transferred to C the fourth defendant, and the fourth defendant has also taken a stand not to contest the matter, nor did it take part in the trial. Accordingly, prayer (e) is redundant and cannot be granted.

D **[47]** The third defendant subsequently transferred the vessel to the fifth defendant ('Optimum Aim') on 12 October 2004.

[48] The third defendant argues that they are able to do so, and that this transfer is not void as the plaintiff has no rights of action against them. The E third defendant argues that the plaintiff's remedy is to claim against the borrower for the loan, namely the first defendant. The plaintiff had in actual fact commenced an action against the first defendant and the guarantors in the Kuantan High Court.

F **[49]** In the case of *The Shizelle* [1992] 2 Lloyd's Rep 444, the Admiralty Court in the Queen's Bench Division considered the position of whether a bona fide purchaser for value of an unregistered vessel be liable to mortgagees under an unregistered mortgage of the vessel where he has neither actual nor constructive notice of the mortgage at the time of the purchase of the vessel. G The facts of the case in *The Shizelle* were that the defendants applied to strike out the statement of claim and action of the plaintiff against them under a mortgage of the vessel Shizelle in which the defendants had bought from the mortgagor. The defendants denied the validity of the mortgage since they had purchased the vessels without any knowledge that there was such a mortgage. H The agreement between the defendants was with a third party who had actually taken a loan from the plaintiff to finance the purchase of the vessel. The agreement was for a sale 'free from any encumbrances'. The vessel was not registered on any register. The defendants who purchased the vessels did now know or have any reason to suspect that there was a mortgage or charge on the I vessel, and were therefore bona fide purchasers for value of the vessel who had no knowledge, actual, or constructive, of the plaintiffs' mortgage. Mr Adrian Hamilton QC, who sat as a deputy judge of the High Court came to the conclusion that a legal mortgage at common law is enforceable, but an equitable mortgage would *not be enforceable against a bona fide purchaser for*

value without actual or constructive notice of the mortgage at the time of the purchase of the vessel. (Emphasise added.)

[50] The court would like to remind itself that in this case before the court, the directors of the third defendant namely, Zuraini and Mohd Zefri are the children of Encik Mohd Zin (a director in the second defendant) and that the companies have very close ties. An official search with the Companies Commission of Malaysia also reveals that the business address of the third defendant is the same as the address of the first defendant and the second defendant. Thus, the defence that the third defendant is a bona fide purchaser without notice cannot stand, as it is quite unlikely that the third defendant did not know that of the ownership of the two vessels were in the names of the second defendant but subjected to the equitable mortgage of the plaintiff.

[51] Thus, it would appear that the effect of the transfer of the vessels in breach of the subsisting equitable mortgage is that the plaintiff does enjoy equitable rights over the said vessels and is able to take action against the second defendant for transferring the vessels to the third defendant. This is because of the close relationship between the first defendant and the second defendant whereby the second defendant was at all times fully appraised of the fact that the vessels were to be mortgaged to the plaintiff. This may be inferred from the factual matrix relating to the grant of the banking facilities to the first defendant so as to enable the second defendant to purchase the vessels. The argument that the second defendant transferred ownership of the vessels to the third defendant as the second defendant was not allowed to do shipping business or that the plaintiff had no beneficial interest in the vessels can not stand as this was not a tenable stance for the second defendant to take. The second defendant was at all times well aware that the vessels were financed by the plaintiff, and any reasonable company would know that no bank is likely to give out a loan for millions of ringgit without expecting any interest in the vessels.

[52] Whether the plaintiff's claim over the vessels would succeed or fail would be discussed further below as other events come into play, namely the interests of other bona fide purchasers will be dealt with below.

Were the transfers effected to avoid the registration of the equitable mortgage?

[53] The plaintiff argues that the first defendant to the fourth defendant had in fact manipulated the whole transaction in the registration of the vessels as well as the creation of the statutory mortgage in order to defeat the plaintiff's mortgage.

[54] The vessels were first registered under the name of the second defendant

on 14 September 2000 at the Registrar of Malaysian Ship, Port Klang. No mortgage was ever registered in the name of the plaintiff. The first transfer was the transfer of ownership of the vessels from the second defendant to the third defendant. This transfer transaction took place on/or about 27 November 2000 and the transfer from the second defendant to the third defendant was purportedly done pursuant to a bill of sale dated 23 October 2000. The plaintiff argues that this transfer was done in breach of the terms of the facility agreement granted to the first defendant, and that this transfer was done without the knowledge and/or consent of the plaintiff, furthermore the plaintiff argues that the third defendant and the second defendant are one of the same. The third defendant argues that they acquired good title of the vessel and have no knowledge of any loan transaction between the plaintiff and the first and second defendant, and as there were no encumbrances registered on both the vessels, thus both the vessels were rightfully transferred into the name of the third defendant on 27 November 2000 from the registered owner which was the second defendant. I have concluded above that the transfer from the second defendant to the third defendant was effected to avoid the priority/effect of the equitable mortgage.

[55] It now falls to be considered whether the transfer from the third defendant to the fifth defendant by the same director, Encik Mohd Zin, was done so as to avoid or evade the effects of the equitable mortgage enjoyed by the plaintiff.

[56] The third defendant transferred the vessels to the fifth defendant on 12 October 2004. This was after the plaintiff has filed an action in the High Court of Kuantan on 30 September 2004. This may also be a strategy by the third defendant in order to avoid the plaintiff staking their claim on the vessels.

[57] As discussed above, the directors of the third defendant namely, Zuraini and Mohd Zefri are the children of Encik Mohd Zin (a director in the second defendant). The companies thus have very close ties. An official search with the Companies Commission of Malaysia also reveals that the business address of the third defendant is the same as the address of the first defendant and the second defendant, and the address of Encik Mohd Zin, Zuraini and Mohd Zefri are also the same.

[58] PW2 and PW3 who are both directors in the first defendant company, testified in their evidence-in-chief that DW1, Encik Mohd Zin, has control over the first defendant and that both of them are mere directors on paper. In other words, they played no independent role in the running of the operations of the third defendant company. All matters were dealt with by Encik Mohd

Zin, ('DW1'). A consideration of the factual matrix therefore discloses that it was effectively DW1 who had:

(a) procured the loan for the first defendant from the plaintiff;

(b) registered the vessels in the name of the second defendant;

(c) was responsible for the operations of the second defendant;

(d) had masterminded and determined the transfer of ownership of the vessels from the second defendant to the third defendant;

(e) had full and effective control of the third defendant; and

(f) had transferred the vessels from the third defendant to the fifth defendant.

[59] It may be inferred from the fact of the non-payment of the loan as well as the foregoing transfers that DW1 has through the vehicle of these various companies effected the transfers with a view to avoiding the equitable mortgage subsisting in favour of the plaintiff. This shows that DW1 had manipulated the transfer of the vessels from the second defendant to the third defendant, and the transfer from the third defendant to the fifth defendant, for the purposes of defeating the plaintiff's rights over the said vessels.

[60] In the case of *The Enfield; Barbury (Panama) SA & Anor v CrossOceanic Navigational Services Pte Ltd* [1982] 2 MLJ 106, a decision of the Singapore Court of Appeal, His Lordship Justice Lai Kew Chai in dismissing the appeal of the respondents, held that:

> (1) the purported sale of the vessel by Enfield Shipping Corporation SA to Barbury was a device and a sham designed to defraud claimants such as the respondents so that the vessel as a security was put out of their reach; (2) the court is entitled to look at the transactions and determine the true beneficial ownership of the vessel; (3) the evidence amply confirmed that Barbury did not carry the true face of a corporate bona fide purchaser and that the Enfield Shipping Corporation SA were at all material times the beneficial owners of the vessels.

[61] Thus, the defence that the third defendant is a bona fide purchaser without notice cannot stand, as it is not plausible that the third defendant did not know that the two vessels were subject to an equitable mortgage in favour of the plaintiff. The third defendant never adduced any evidence in the course of the trial to show that there was in fact any consideration exchanged between the second defendant and the third defendant to indicate that the third defendant was a bona fide purchaser. It is more probable that the second defendant and third defendant companies are inter-related and thus there were no qualms as to the transfer of the property between them. This is clear evidence of a manipulation executed by the second defendant in transferring

A the vessels from the second defendant to the third defendant, and again by the third defendant to the fifth defendant.

What is the effect of a transaction effected in breach of a court order?

B

[62] The fifth defendant entered into a consent order on the 20 June 2005 with the plaintiff. The order amounted in effect to an injunction. The injunction was recorded by consent between the plaintiff and the fifth defendant and it prevented the fifth defendant from undertaking any form of C dealings with the said vessels.

[63] Notwithstanding the said injunction, the fifth defendant proceeded to sell and transfer the ownership of the said vessels to the sixth defendant pursuant to two bills of sale dated 15 August 2005 for 'Zuhairi' and 8 February D 2007 for 'Nasuha'. Both the bills of sale dated 15 August 2005 for 'Zuhairi' and 8 February 2007 for 'Nasuha' was registered at the Pejabat Pendaftaran Kapal-Kapal Malaysia Pelabuhan Klang pursuant to Certificate of Malaysia Registry No 328412 and Certificate of Malaysia Registry No 328413 respectively in favour of the sixth defendant. The sixth defendant also executed E a mortgage over the said vessels in favour of the seventh defendant vide a mortgage which was recorded on 13 April 2006 and 17 February 2007. The sixth defendant had obtained a loan facility from the seventh defendant to finance the purchase of the said vessels from the fifth defendant. The plaintiff contends that the transfer was done without the knowledge and/or consent of F the plaintiff and in breach of the injunction order dated 20 June 2005.

[64] According to the sixth and seventh defendants, the fifth defendant did not disclose the existence of the said injunction, nor the ongoing court G proceedings in Kuantan to the sixth and seventh defendants.

[65] The plaintiff contends that the sale and purchase agreements between the fifth and sixth defendants and the mortgage between the sixth and seventh defendants are rendered null and void by invoking the doctrine of frustration H because of the existence of the injunction order dated 20 June 2005. The plaintiff argues that the doctrine of frustration pursuant to s 57 of the Contracts Act 1950 of the applied to nullify the agreement and/or transfer of the vessels from the fifth defendant to the sixth defendant, therefore rendering the mortgage registered in the name of the seventh defendant as void.

I

[66] Section 57 of the Contracts Act 1950 states that:

(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes

impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful

(3) Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, the promisor must make compensation to the promise for any loss which the promise sustains through the non-performance of the promise.

[67] The plaintiff referred to the High Court decision in the case of *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 wherein His Lordship Justice Lim Beng Choon held that:

The court is satisfied that because of the injunction obtained by Monsia Investments Pte Ltd restraining both the plaintiff and the defendant from acting on the redemption agreement, the agreement has been rendered impossible to perform within the terms and conditions of the agreement. The very essence of the agreement has been frustrated as the performance of the same would be a radical change of its original terms and conditions, in that the redemption agreement was intended to suspend the right of the plaintiff to institute foreclosure proceedings against the charged lands, if and only if, the defendant was able to comply with the redemption agreement within the time stipulated in the agreement. The effect of the injunctive order rendered the redemption agreement to be nugatory, and under the circumstances the right of the plaintiff to proceed with the foreclosure proceeding is no longer subject to the redemption agreement.

[68] The plaintiff also referred to the cases of *Shigenori Ono v Thong Foo Ching & Ors* [1992] 1 MLJ 117, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 41 ALR 367, and *Re HEH The Nizam's Jewellery Trust* AIR 1980 SC 17.

[69] However, in all these cases, the act of frustration comes into play as a supervening act, an act which happened after the contract is formed and not before. In the case before the court today, the injunction order was made before the agreement was formed between the fifth defendant and the sixth defendant. Had the injunction been granted after the bills of sale were entered into, then there might be a possibility of the fifth defendant claiming the contract to be frustrated and unable to be performed.

[70] This is also seen in the *Standard Chartered Bank*'s case at p 254, where His Lordship Justice Lim Beng Choon said that:

The relevant law relating to discharge of a contract by frustration is encompassed in s 57(2) of the Contacts Act 1950 (Act 136) which reads:

A

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> It appears that the language of the section envisages two main instances of frustration — when a contract to do an act becomes (a) impossible or (b) unlawful. The frustration should be caused by some *supervening and subsequent event occurring after the formation of the contract*. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligations. (Emphasis added.)

B

C

[71] I shall not go into the details of the doctrine of frustration as the doctrine has been well developed throughout the years by the courts, and by statute. However it is pertinent to note that in *Davis Contractors Ltd v Fareham Urban District Council* [1956] 2 All ER 145, Lord Radcliffe said at p 729:

D

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

E

[72] Given the foregoing, I conclude that the plaintiff's contention that the transfer from the fifth defendant to the sixth defendant is defeated by the doctrine of frustration is untenable. I have explained above the act on which the plaintiff relies to claim frustration, is in fact an event which arose prior to the sale transaction between the fifth defendant and the sixth defendant. It did not arise subsequent to the sale transaction between the fifth defendant and the sixth defendant. As such, while such a sale might give rise to consequences such as contempt vis a vis the fifth defendant, it is not possible to conclude that the transaction between the fifth defendant and the sixth defendant is rendered null and void given that the sixth defendant was at all material times a bona fide purchaser for value without notice of the existence of the injunction.

F

G

[73] The plaintiff contends that the transfer of the vessels from the fifth defendant to the sixth defendant was made against the injunction order and thus the breach of the court order renders the whole transaction between the fifth defendant and sixth defendant void as the situation embodies the elements of the doctrine of frustration which frustrates the contract between the fifth defendant and sixth defendant. The plaintiff's stand is that since the instruments for the transfers of the vessels were unlawful, thus the natural flow of course would be that the transfer was void. The plaintiff therefore argues that their rights in the equitable mortgage over the vessels should take priority over the rights of the sixth defendant and seventh defendant whose rights had in actual fact been frustrated and that their recourse would be under the

H

I

Contracts Act. The plaintiff argues that the remedy of the sixth defendant and the seventh defendant would be to claim indemnity against the fifth defendant.

[74] However, it would be unjust to place a burden on the sixth defendant to seek out any injunctions which could be placed on the vessel. It is also unreasonable to burden the sixth and seventh defendant to foresee any injunction or equitable mortgages. As far as they are concerned, they carried out the requisite searches at the registry and found no encumbrances. There were no mortgages for the said vessels upon conducting their search and that it appeared to them that there was no impediment to the sale and purchase agreement entered into between themselves and the fifth defendant. It appeared that the fifth defendant was able to deliver the vessels with clear titles. It would also be unfair to rob the sisth and seventh defendant of their rightful ownership of the vessels when the sixth defendant had lawfully entered into the sale and purchase agreement with the fifth defendant entirely unaware of the injunction. It is not in dispute that the sixth defendant had no knowledge of the existence of the injunction. In this context, the plaintiff did call PW4, Mr Roslee bin Mat Yusof, the Registrar of Malaysian Ships to testify.

[75] The fifth defendant however would have definitely foreseen some trouble when they sold the vessels to the sixth defendant as they were fully informed of the injunction order having being a consented party to it. Nevertheless, they proceeded, in breach of the injunction order to transfer the vessels to the sixth defendant and created a statutory mortgage in favour of the seventh defendant. The fifth defendant may well be open to charges of contempt of court, but that in itself does not render the sale to any innocent bona fide third party purchaser such as the sixth defendant, becoming invalid.

[76] The seventh defendant contends that the statutory mortgage for the said vessels were registered with Port Klang Marine Registry on the 29 November 2007 for 'Zuhairi' and on 17 April 2007 for 'Nasuha' without the seventh defendant's knowledge of the injunction order. The seventh defendant asserts that the transfer and registration of the statutory mortgage by the seventh defendant was done lawfully and without any element of fraud, and thus valid.

[77] A brief study of the sale and purchase agreement dated 15 August 2005 for 'Zuhairi' and the sale and purchase agreement dated 8 February 2007 for 'Nasuha' both entered into between the fifth defendant and the sixth defendant particularly at cl 7 pertaining to the representation and warranties, which states as follows:

> The Vendor hereby represents and warrants to the Purchaser that —
>
> (a) …

A (b) …

(c) there is no beneficial or other interest or claim by any person and the Vessel is not subject to any dispute or claims whatsoever and should any claim been made against the Vessel prior to the time of delivery, the Vendor hereby undertake to indemnify the Purchaser against all consequences of such claims;

B

(d) according to the Vendor's knowledge, there are no circumstances or situation which exists which impede or prevent the handing over of constructive possession of the Vessels or exclude the right and entitlement of quite enjoyment of the Vessels by the Purchaser;

C

[78] The fifth defendant clearly breached the terms in cl 7 of both the sale and purchase agreements entered with the sixth defendant, as the fifth defendant was clearly aware of the dispute between the plaintiff and the first, second and third defendants. In fact, the fifth defendant had an order made against them precluding them from dealing with the vessels, and notwithstanding this injunction, and without the consent and/or knowledge and/or approval of the plaintiff, and whilst the action was still pending, the fifth defendant went ahead and sold and transferred the said vessels to the sixth defendant. As the fifth defendant did not set aside the injunction order, therefore the injunction order is still valid and any form of dealings with the said vessels remain a contempt of the court order.

D

E

[79] I therefore conclude that the doctrine of frustration does not come into play, and that the available remedy for the plaintiff against the fifth defendant for the breach of the injunction order exists by way of initiating a contempt proceeding against the fifth defendant.

F

Whether a registered mortgage has priority over a prior eguitable mortgage?

G

[80] The sixth defendant submits that it is a bona fide purchaser for value of the vessels and it had no notice of any injunction, nor notice of any equitable mortgage in favour of the plaintiff. They sixth defendant had paid the consideration in full to the fifth defendant, financed by a loan from the seventh defendant.

H

[81] The seventh defendant was the finance company which financed the loan for the sixth defendant to purchase the vessels 'Zuhairi' and 'Nasuha'. The seventh defendant granted one facility under BBA to the sixth defendant to finance the purchase of 'Nasuha' for a loan of RM3,280,000 on 29 March 2007, and on 25 October 2007, the seventh defendant granted one facility under BBA to the sixth defendant to finance the purchase of 'Zuhairi' for a loan of RM1,740,000.

I

[82] The seventh defendant registered their interest in the vessels with the Port Klang Marine Registry, on 17 April 2007 for 'Nasuha' and 29 November 2007 for 'Zuhairi'.

[83] No caveat or charge was ever entered by the plaintiff on the said vessels, and at the time the statutory mortgages were entered in the name of the seventh defendant, the vessels were free from encumbrances. The seventh defendant therefore contends that they enjoy a statutory mortgage over the two vessels. Thus, the seventh defendant maintains that it has a right of priority over all unregistered mortgagees, as well as priority in order of the date on which the mortgage is registered. This is envisaged in s 43 of the Merchant Shipping Ordinance 1952 which states that 'if there are more mortgages than one registered in respect of the same ship or share, the mortgages shall have priority in the order of the date on which the mortgage in recorded in the register book'.

[84] Section 41 of the Merchant Shipping Ordinance 1952 states that:

> (1) A registered ship or a share therein may be made in security for a loan or other valuable consideration, and the instrument creating such security shall be in the form, as may be prescribed by the Minister.
>
> (2) On production of the instrument to the registrar of the ship's port of registry he shall record such instrument in the register's book; and when there are more mortgages than one, record them in the order in which they are produced to him and by memorandum notifying each mortgagor of the mortgage recorded by him.

[85] The plaintiff argues that due to the instrument of transfer, namely the sale and purchase agreements between the fifth and sixth defendants and the mortgage between the sixth and seventh defendants being in contempt of an injunction order dated 20 June 2005, therefore the whole agreement is frustrated and therefore void. The plaintiff argues that the doctrine of frustration pursuant to s 57 of the Contracts Act 1950 applied to nullify the agreement and/or transfer of the vessels from the fifth defendant to the sixth defendant, therefore rendering the mortgage registered in the name of the seventh defendant as void.

[86] The six and seventh defendant maintains that as they were bona fide purchasers for value without notice, they are entitled to the vessels. On top of that, the plaintiff never registered their interest or the mortgage.

[87] In the case of *The Horlock* (1877) 2 PD 243, His Lordship Sir Robert Phillimore held that:

A … a purchaser purchasing from an owner of registered property for a valuable consideration without any notice of fraud, and combining therefore a legal and equitable title, is not liable to have such title impeached on the ground of fraud to which he was not a party; such fraud being between the person who at the time of the purchase appeared on the register as owner and another person. I should observe here that the ownership is still registered, according to the bill of sale in question. Now the law appears to be concisely laid down in the case of *Heath v Crealock* (LR 10 Ch 22 at p 33), in 1874, by the Court of Appeal in Chancery. The passage to which I am about to refer contains what was there said by Lord Justice James upon the general question. That learned judge says:

B

C With regard to the purchasers, it appears to me that there are two cardinal principles and rules to this court which are involved both on the one side and the other. The first I take to be this, which in my opinion, is a rule without exception, that from a purchaser for value without notice this court takes away nothing which that purchaser has honestly acquired.

D That term in the judgement appears to govern this case. Here is a purchaser for value without notice who has honestly acquired some interest in these shares.

If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this court, in my opinion, has no right to interfere with him; and it would be, in my judgment, interfering with him if, through the form of a decree directing a sale instead of a foreclosure, or

E anything of that kind, it merely did indirectly that which it would not do directly — deprive him of possession of land or deeds in favour of the plaintiff.

[88] His Lordship Sir Robert Phillimore went on to say:

F I do not know what words can more exactly apply to the present case, and I must presume that to be a correct enunciation of the law; and if that be, generally speaking, a correct statement of the law, it is, if I may so express myself, a fortiori, applicable to a case arising under the 43rd section of the Act in question; because the object of the section, as it appears to me, was to give evidence of title by the name of

G the owner appearing upon the register. It is not necessary that I should say that in no case would the court inquire into the question whether a bill of sale, as it alleged in this case, transferring shares in a vessel, had been registered in fraud. It is not necessary that I should decide that question; but the question which I have to decide, and which I desire to be understood alone to decide is that, assuming the purchaser in this case to have purchased without notice of fraud for a valuable

H consideration under this bill of sale and to have so become possessed of these shares, and also, which is a point that should not be omitted, to have got his name upon the register, in such a case it is not competent to the court (to use the phrase used on the argument of this case) to look behind the register for the purpose of dispossessing an innocent purchaser whose name is on the register. He combines, in my judgment,

I both a legal and equitable title, of which it is not competent to this court to dispossess him.

[89] His Lordship Sir G Mellish, also stated in his decision in *Pilcher v Rawlins* (1872) 7 Ch App 259 that:

> The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely that this court will not take an estate from a purchaser who has bought for valuable consideration without notice …

[90] Of course, the facts of the case in the *Pilcher* case differ in that the mortgage was over a legal estate, as compared to that of the mortgage in the case today, however, the principle is the same. Thus the argument would be that a prior equitable interest would be defeated by a subsequent legal interest of the party which acquires the later interest, if they were a bona fide purchaser without notice of the prior equitable interest.

[91] In the Singapore case of *The Jarguh Sawit; Navigation Maritime Bulgare v Owners of the Ship or Vessel 'Jarguh Sawit'* [1995] 3 SLR 840, there was an appeal against the decision of the assistant registrar. In this case, the plaintiff had entered into an agreement with a Singapore company (one Oxford Jay International Pte Ltd) to sell to the latter the said vessel. The purchase price was partly in cash, and partly by a loan which was secured by an unregistered mortgage. There was also no registration of any charge filed in the Registry of Companies in Singapore in respect of the said mortgage. The plaintiff made demands for the unpaid balance due under the loan agreement. Sometime after the loan agreement, the vessel changed owners are underwent a number of changes to its names, unbeknown to the plaintiffs. The plaintiff sought to enforce the mortgage against the vessel but the assistant registrar refused to grant the application by the defendants to set aside the writ of summons. The principal ground of the application before the assistant registrar was that the court's admiralty jurisdiction had been wrongly invoked as the current owners of the arrested vessel were bona fide purchasers for value without notice of any mortgage of the vessel. The High Court on appeal dismissed the appeal by the defendants. Rubin J in his judgment at pp 844–845 considered the following passage in *Ship Sale and Purchase* by Iain Goldrein (2nd Ed), at p 206:

> … The consequences of failing to register a mortgage are usually that the security is lost and the mortgage will be unenforceable against purchasers of the ship, and priority will be lost to a later mortgage of the ship. Failure to register may also mean that any priority is lost in a court sale of the ship and the distribution of the proceeds of sale to maritime claimants.

[92] Reliance was also placed on a passage in *Ship and Aircraft Mortgages* by Nigel Meeson (1989), where at p 51 the author says:

> Where the formal requirements of registration have not been complied with, nevertheless as between the mortgagor and the mortgagee the instrument will be effective. As against third parties, however, the instrument will not provide the mortgagee with the priority afforded by the Act to registered mortgages.

[93] Although Rubin J dismissed the defendant's appeal, the reasoning behind it was not because prior unregistered mortgages defeated or took priority over later registered mortgages but because in *The Jarguh Sawit*'s case, the issue was whether the current owners of the arrested vessel were in fact bona fide purchasers for value without notice of the mortgage. It appeared in *The Jarguh Sawit*'s case that they were not bona fide purchasers for value without notice of the mortgage.

[94] Thus, the case can be distinguished from our present case where the sixth defendant appears to be bona fide purchasers for value without notice.

[95] In the Australian case of *Advertising Department Pty Ltd v The Ship MV Port Philip* [2004] FCA 1762, the point in issue before the Federal Court of Australia was whether the true owner or unregistered mortgagee of a ship can impeach the title of a registered mortgagee who took his mortgage from a person who by fraud became registered as the owner. Finkelstein J said in his judgment that:

> The register of ships is evidence of title. If a person in good faith acquires an interest in a ship from the registered owner he will obtain an indefeasible title that will defeat any prior unregistered right or interest, regardless of whether the prior right or interest is legal or equitable. It makes no difference that the owner obtained his registration by fraud, provided the person who acquired the interest was not party to, or did not know of the fraud.

[96] In the English case of *Black v Williams* [1895] 1 Ch 408, the court held that the registered owner of a mortgage had priority over the prior equitable title of a debenture holder.

[97] Vaughan Williams J said at p 421 that although the Merchant Shipping Acts did not ignore equitable titles, 'it nevertheless did intend that all the provisions of the Act of 1854 with regard to the registration of titled and the priority of unregistered titles should have effect given to them'.

[98] He added that 'I hold, therefore that the title of the applicants, who have got a mortgage in the statutory form which has been registered, is to be preferred, to the title of the debenture-holders, who, having a prior equitable title, and being entitled to get that converted into a legal title in the statutory form and registered, chose not to do so. There is no hardship whatever in such a decision. The Act of Parliament was passed for the benefit of commerce, and in order that English ship might be easily dealt with by English ship owners'.

[99] The Legislature has recognised that occasions arise when it is to the interest of the whole community that people should be able to raise money on

ships by sale or mortgage, and in the interests of the general public it has therefore provided that registered titles in the statutory form shall have the priority, thus enabling those who are disposed to purchase or lend money upon ships to do so with perfect confidence that their titles will not be overridden by priority being obtained by equitable unregistered titles which happen to be prior in point of time, and which, for reasons of their own, the owners of those equitable titles have not thought fit to convert into legal form, or to register in the way pointed out by statute.

[100] In the case of *Barclay & Co Ltd v Poole* [1907] 2 Ch 284, the bank took a mortgage from the registered owner over 20 shares in a ship but was asked not to register the mortgage. The registered owner then sold the shares to the defendant. After the contract but before the purchase money was paid, the purchasers received notice of the bank's unregistered mortgage. It was in these circumstances that the bank claimed priority over the purchaser's interest. Swinfen Eady J found for the purchasers, and held that registered mortgage takes precedence over prior unregistered mortgage. He said at p 289:

> It cannot be disputed that the purchasers acquired a valid title to the shares. They took an absolute bill of sale without notice of any prior charge, and their title to the shares is absolute.

[101] Thus, relying on the principles in all the above case, the seventh defendant who has the statutory mortgage over the vessels would have priority of claim over that of the plaintiff who only acquires an equitable mortgage.

[102] The plaintiff by their own negligence has failed to register the mortgages over the said vessels.

[103] Therefore, although the plaintiff may have an equitable mortgage, the seventh defendant's registered mortgage will take precedence over the plaintiff's prior unregistered mortgage.

CONCLUSION

[104] Based on all the evidence adduced before the court, it is quite evident that the plaintiff's claim against the first defendant would be for the loan monies unpaid. The second and third defendant companies are agents of manipulation to enable the first defendant to defeat the plaintiff's mortgage. The plaintiff's claim against the fifth defendant would be for contempt of a court order granted, as although they may have been innocent in purchasing the vessels from the third defendant, they had full knowledge of the suit, and yet subsequently sold of the vessels knowing they had an injunction made against them. The fifth defendant would also be liable to indemnify the

plaintiff for damages suffered by the plaintiff for the breach of the court order. The reason why the fifth defendant is to bear the damages suffered by the plaintiff is, but for the fifth defendant's disregard to the court order, that is to say, by disobeying the injunction, and transferring the vessels to the sixth defendant, the plaintiff cause of action against the sixth and seventh defendants would not have arose.

[105] The plaintiff has no claim against the sixth and seventh defendants, as the sixth defendant is a bona fide purchaser for value without notice and although the plaintiff may have an equitable mortgage over the said vessels, the seventh defendant's registered mortgage will take precedence over the plaintiff's prior unregistered mortgage.

[106] In these circumstances, I am constrained to refuse or dismiss all of the reliefs sought by the plaintiff save for prayers (j), (n) (o) and (p) which I allow. Damages to be assessed by the registrar.

[107] I would like to take this opportunity to place on record my gratitude to learned counsel, particularly Mr Vigesh Kumar Krishnasamy who acted for the plaintiff, for his extensive and comprehensive research.

Plaintiff's claim dismissed.

Reported by Kanesh Sundrum